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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF NEVADA

15  
16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 vs.

19 HENRI WETSELAAR, M.D.,  
20 DAVID A. LITWIN, and  
21 JASON C. SCOTT, R.PH.,

22 Defendants.

23 CASE NO. 2:11-CR-00347-KJD-CWH

24 **DEFENDANTS' REPLY TO  
25 GOVERNMENT'S OPPOSITION TO  
26 DEFENDANTS' MOTION FOR  
27 DISCOVERY**

28 Defendants Henri Wetselaar, M.D. and David Litwin, through their undersigned counsel,  
hereby certify that this Reply is timely filed in accordance with Local Rule 12-1(c).

29 **DEFENDANTS' REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANTS'  
30 MOTION FOR DISCOVERY**

31 Defendants show this Court that the government has not fully complied with its discovery  
32 obligations in that the government's application of those obligations fails to meet the standards for  
33 a fair trial as mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), *Smith v. Cain*, 132 S.Ct. 627  
34 (2012), *United States v. Price*, 566 F.3d 900 (9th Cir. 2009), *United States v. Acosta*, 357 F.Supp.  
35 2d 1228 (D. Nev. Jan. 28, 2005), and Nevada Rule of Professional Conduct 3.8. The government  
36 misapprehends its obligations by acknowledging only two precepts relative to its discovery  
37 obligations. First, the government seemingly contends that it can decide in a vacuum whether the  
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1 information in its possession is favorable to the defense. Second, the government maintains that it  
 2 can shrink its duty to favorable information related solely to the government's case-in-chief. The  
 3 United States Constitution requires more. *Brady* and its progeny require disclosure of all  
 4 favorable information to a defendant with regard to guilt and punishment. *See Price* Section 66  
 5 F.3d at 900; *Acosta* 357 F.Supp.2d at 1228. The courts have never limited the government's  
 6 obligations to information that pertains only to the government's case-in-chief, and the  
 7 government cites no authority in support of this notion. Moreover, the Rule 3.8 of the Nevada  
 8 Rules of Professional Conduct, adopted by this District at LR IA 10-7, requires a prosecutor to  
 9 provide timely all information that tends to negate the guilt of the accused or that mitigates the  
 10 offense. Defendants have never asserted that Department of Justice policy creates a substantive  
 11 right for defendants; rather, it is a code of conduct in and of itself that prescribes good behavior  
 12 and proscribes bad behavior for prosecutors as they attempt to discharge their serious duties under  
 13 the United States Constitution. Therefore, consistent with *Acosta* and *Price*, the court should  
 14 order the government to comply with defendants' specific discovery requests, as these requests  
 15 seek material information necessary to a *fulsome* defense, as opposed to a "fulsome" body of  
 16 certain papers provided by the government. (Opposition, Doc. 83, at 1).<sup>1</sup> Furthermore, because  
 17 defendants' preparation of their case centers on the complexities and nuances of practicing  
 18 medicine and operating a medical practice, pretrial disclosure is necessary at this stage, especially  
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20 <sup>1</sup> The government states that it has provided 26,000 pages of discovery. This is good. However,  
 21 according to the grand jury testimony of case agent Kendra Still, the government seized 1,900  
 22 patient files. Agent Still further testified that the cooperating defendants, particularly Melissa  
 23 Salaices and Carol Allen "coached" patients. Defendants have no interviews obtained by the  
 24 government of these "coached" patients. The government's expert, Steven Richeimer, examined  
 25 only 238 patient files. It appears as though he only examined government summaries of those  
 26 files, which is information that defendants need, as well as a list of physicians who disagreed with  
 27 the government's theory of presumably "substandard" medical practice equating with criminal  
 28 conduct.

1 given the voluminous discovery, which includes patient records, prescriptions and billing  
2 statements, and much of which is pending disclosure. Therefore, defendants respectfully request  
3 that this Court order the government to disclose the items at issue within 30 days of this Reply. In  
4 support of their Reply, defendants submit the following points and authorities.

5 DATED this 10<sup>th</sup> day of May 2013

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

7

8

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17 and David A. Litwin

## POINTS AND AUTHORITIES

## I. INTRODUCTION

3 In its Opposition, the government narrows its discovery obligations, completely ignoring  
4 the holdings in *Smith v. Cain*, *Price*, and *Acosta*. The government seemingly limits its obligations  
5 to its case-in-chief, thereby ignoring the direction and breadth of the investigation that it  
6 conducted. However, the Supreme Court has made it abundantly clear that the government’s  
7 discovery obligations do not rest within a vacuum, limited to unfettered discretion by the  
8 government. *See Kyles v. Whitley*, 540 U.S. 419, 433-438 (1995). In the instant case, the  
9 government’s discovery obligations necessarily include information about the conduct of its  
10 agents and informants during its lengthy investigation of a well-established medical practice. The  
11 government’s discovery obligations necessarily include communications with other agencies and  
12 medical practitioners as the government ultimately contracted its investigation. The government’s  
13 discovery obligations necessarily include the government’s motives (certainly its informants) in  
14 targeting Dr. Wetselaar. Such information, like the background and motives of informants, as  
15 well as their relationships to the agents, represents an integral part of a defense in this type of case  
16 where “unnecessary” medical treatment is alleged. Therefore, the items identified in the Motion  
17 must be disclosed timely, as each one is crucial to preparation of the defense.<sup>2</sup> Defendants note

<sup>2</sup> Defendants show this Court that the government overly condensed defendants' discovery requests in its Opposition. For the Court's convenience, the twelve items as originally stated in Defendants' Motion are as follows:

(1) The rough notes, text messages and electronic messages of all law enforcement working on this case.

(2) All confidential informant files, including all information concerning the status of any paid informant used during the investigation herein and said informant's involvement in any other criminal investigation; full benefits and promises received in exchange for cooperation; the full extent of each informant's assets; and the status of each informant's tax liability.

(3) All impeachment evidence, as contemplated by *Giglio v. United States*, 405 U.S. 150 (1972).

(footnote continued)

1 that the government has provided the grand jury transcript of Agents Robert Erickson and Kendra  
2 Still, so Request 6 has been satisfied. Moreover, there are outstanding discovery requests that the  
3 government seems to have acknowledged it must produce.<sup>3</sup>

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5 (4) All evidence the government intends on offering in its case-in-chief at trial.  
6 (5) All communications, recorded or reported, between any task force member  
7 investigating this case, including the undercover agent, and any confidential informant  
used in this investigation.  
8 (6) Grand Jury testimony made in seeking the return of indictment herein.  
9 (7) Any and all communications, in any format, made with the media and press concerning  
this case.  
10 (8) All evidence or information, including rough notes, law enforcement personnel files  
and oral communications, known to the prosecution team, as defined by USAM 9-5.001,  
that tends to negate the guilt of the Defendant or mitigates the offense, as provided by Rule  
3.8 of the Nevada Rules of Professional Responsibility and as adopted by Local Rule IA  
10-7.  
11 (9) All communications, in any form, between the prosecution team and the Nevada  
12 Attorney General's Office regarding review of any patient files held by Defendants on  
behalf of any and all patients.  
13 (10) All communications, in any form, between the government and prior defense counsel,  
14 Robert Draskovich and John Turco.  
15 (11) All communications with any expert witness who declined to offer an opinion  
16 regarding the government's theory of the case.  
17 (12) A list of all other physicians and medical practitioners for whom pharmaceutical  
records were pulled.

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19 <sup>3</sup> List of pending documents from the government:

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- 21 1. David KUTZ (Jason's brother) took three thumb drive memory sticks from Jason  
KUTZ during summer 2010. The blue memory stick was taken in June 2010. The  
silver and black sticks were taken in late July or early August 2010. Each memory  
stick contains information regarding the prescription fraud scam and/or the tax  
return scan. The memory sticks were sealed in a 1A envelope for retrieval and  
retention purposes, as well as possible exploitation by computer forensic  
examiners. FBI\_000027.
- 22 2. Lams Logbook that records OxyContin dispensed by Lams Pharmacy as outlined in  
the interviews of Terry Cater LAM\_008733, Jason Smith LAM\_019413, Teresa  
Whaley  
LAM\_019436, and Linda Hart LAM\_019430.
- 23 3. All medical records seized during the search warrant(s) retained and stated are  
(footnote continued)

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1 **II. GOVERNMENT'S BRADY OBLIGATIONS**

2 *Brady* requires the disclosure of evidence favorable to the defense as to guilt and  
 3 punishment, and that the evidence is material. *Brady v. Maryland*, 373 U.S. at 87. If the mere  
 4 likelihood that a different outcome could have occurred is great enough to undermine confidence  
 5 in the outcome, then the evidence is material. *Smith v. Cain*, 132 S.Ct. at 630. Furthermore, as the  
 6 government admits, material evidence must be viewed by its “net effect,” under the totality of the  
 7 circumstances. (Doc. 83, at n2, quoting *Kyles*, 540 U.S. at 437-38). Defendants submit that each  
 8 of the specific items enumerated in their Motion contains information favorable to their defense;  
 9 and if any of these items are withheld, particularly as the items concern the conspiracy charge, it is  
 10 likely that the outcome at trial or at sentencing would be different. In other words, a jury needs to  
 11 know what motivated anonymous tipsters and snitches used by the government when it decided to  
 12 target Dr. Wetselaar. A jury needs to know why the government seized every single patient file

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relevant by

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the government to support prosecution as stated in letter from Crane Pomerantz dated  
 January

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11, 2013. Note that these records were reviewed and summarized by the government.

17

- 18 4. All receipts and financial records generated by Dr. Wetselaar’s office, including hand-  
 written receipts for payments made to Dr. Wetselaar, super-bills, or any other billing  
 documentation relating to the services rendered to patients by Dr. Wetselaar and/or New  
 Amsterdam Medical Group.
- 19 5. An index of the discovery previously produced including discovery relating to the  
 financial crimes involving IRS allegations (money laundering / structuring). See, part  
 of this request was promised by Crain in his letter dated January 11, 2013.
- 20 6. Copy of all original prescriptions that were presented under Dr. Wetselaar’s name,  
 including any and all prescriptions allegedly forged by David Litwin, written and/or  
 signed by Dr. Wetselaar.
- 21 7. Copy of all prescriptions generated by Lam’s Pharmacy (typed) for Dr. Wetselaar’s  
 signature/approval while Dr. Wetselaar was out of the office.
- 22 8. Color copies of all photographs previously produced in black and white.
- 23 9. Pre-Sentence Investigation Reports of Jason Kutz, Carolyn Allen and Melissa Salaices.
- 24 10. Any and all materials from LVMPD in the government’s possession, including reports  
 and witness statements pertaining to Dr. Wetselaar, David Litwin, and/or New  
 Amsterdam Medical Group.

1 from Dr. Wetselaar's clinic, and then turned over files to the Nevada Attorney General for review,  
 2 which ultimately went nowhere. A jury needs to know in what format the government's expert  
 3 witness reviewed patient files and why the government provided those files for review. It follows  
 4 that a jury needs to know who and how many experts the government shopped before it decided to  
 5 use the one it chose. Since this case was trumpeted as a significant matter in the press, a jury needs  
 6 to know how the investigation was internally characterized, as it shows government motive and  
 7 bias in targeting Dr. Wetselaar and not other physicians who maintain a similar practice.

8 **III. GOVERNMENT'S OBLIGATIONS PURSUANT TO NRPC 3.8 AND LOCAL  
 9 RULE 1A 10-7**

10 *Acosta* addressed the very issues here: pretrial disclosure obligations set forth by *Brady*, as  
 11 adopted by the Nevada Rules of Professional Conduct 3.8, require prosecutors practicing in  
 12 Nevada federal court to:

13 (d) Make timely disclosure to the defense of all evidence or information known to  
 14 the prosecutor that tends to negate the guilt of the accused or mitigates the offense,  
 15 and, in connection with sentencing, disclose to the defense and to the tribunal all  
 16 unprivileged mitigating information known to the prosecutor, except when the  
 17 prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

18 The *Acosta* Court analyzed at length the duties imposed by Rule 3.8, concluding that Rule 3.8  
 19 broadens a prosecutor's pretrial disclosure duties. *Acosta*, 357 F.Supp. 2d at 1232-33. In *United*  
 20 *States v. Price*, the Ninth Circuit, "note[d] favorably" the *Acosta* analysis, as follows:

21 For the benefit of trial prosecutors who must regularly decide what material to turn  
 22 over, we note favorably the thoughtful analysis set forth by two district courts in  
 23 this circuit:

24 [T]he 'materiality' standard usually associated with *Brady* . . . should  
 25 not be applied to pretrial discovery of exculpatory materials. . . .  
 26 [J]ust because a prosecutor's failure to disclose evidence does not  
 27 violate a defendant's due process rights does not mean that the  
 28 failure to disclose is proper. . . . [T]he absence of prejudice to the  
 defendant does not condone the prosecutor's suppression of  
 exculpatory evidence [ex ante]. . . . [R]ather, the proper test for  
 pretrial disclosure of exculpatory evidence should be an evaluation  
 of whether the evidence is favorable to the defense, i.e., whether it is  
 evidence that helps bolster the defense case or impeach the  
 prosecutor's witnesses. . . . [I]f doubt exists, it should be resolved in  
 favor of the defendant and full disclosure made. . . . [T]he  
 government [should therefore] disclose all evidence relating to guilt

1 or punishment which might reasonably be considered favorable to  
 2 the defendant's case, even if the evidence is not admissible so long  
 3 as it is reasonably likely to lead to admissible evidence.

4 *Price*, 566 F.3d at 913 (citing *Acosta*, 357 F.Supp. 2d. at 1239-40) (internal citations omitted).

5 While the government acknowledges its disclosure "discretion" (Opposition, Doc. 83, at  
 6 2:21-26), it does not then show how it has carried its "corresponding burden" (*Id.* at 2:24). The  
 7 government fails to demonstrate compliance with Rule 3.8, as required under this Court's Local  
 8 Rule IA 10-7, or that it has complied with the constitutional obligations imparted by *Brady* and its  
 9 progeny, including *Kyles*, which requires disclosure of information that is favorable to defendant  
 10 with regard to guilt and punishment. The government instead asserts that what it has not disclosed  
 11 falls into one of the following three categories: (1) evidence that is immaterial "in the sense that it  
 12 will not be used in the United States' case-in-chief," or (2) that "does not relate to the subject  
 13 matter of a witness' testimony[,]" or (3) that "will not undermine confidence in the outcome of the  
 14 trial[.]" (Opposition, Doc. 83, at 2:11-14) (numeration added). The government seems to conclude  
 15 that each request necessarily falls into one of those categories because if the request were for  
 16 something discoverable, the government would have already turned it over. Even if this were an  
 17 accurate summary of materiality (which defendants contend it is not), not one of the government's  
 18 request-specific arguments addresses the "corresponding burden" of discretionary disclosure by  
 19 the prosecution team. *See Kyles*, 514 U.S. at 437-38 (noting that the government has a "degree" of  
 20 discretion but that, as its consequent responsibility must "gauge the likely net effect of all  
 21 [favorable] evidence and make disclosure when the point of 'reasonably probability' is reached").

22 For example, the government refuses to produce informant files except for those it  
 23 anticipates it will call at trial. (Opposition, Doc. 83, at 19-20). However, by this approach the  
 24 government could simply veil the warts of its investigation by charging around its corrupt  
 25 informants. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (The U.S. Attorney's "interest,  
 26 therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").  
 27 Here, the informants' involvement is a key component of the defense in that the investigation  
 28 seemingly started with anonymous tipsters (disgruntled former patients discharged by Dr.  
 29 Wetselaar?) and burgeoned into cooperating informants with significant criminal histories who

1 clearly have a stake in the outcome of this case. Thus the materiality of the government's  
 2 confidential informant files has little to do with whether the government categorizes these  
 3 informants as percipient witnesses but everything to do with the scope and breadth of this  
 4 investigation. Indeed, governmental misconduct, which includes mismanaged cooperators or  
 5 incredulous, unsubstantiated snitches, surely undermines confidence in the outcome of a trial.

6 The government oversimplifies the holding of *United States v. Brodie*, 871 F.2d 125 (D.C.  
 7 Cir. 1989), by stating it supports the argument that the government does not have to reveal the  
 8 identities of the confidential informants. Instead, *Brodie* stands only for specificity in a  
 9 defendant's request. In *Brodie*, "defense counsel declined the trial court's invitation to elaborate  
 10 on whether Brodie's need for the informant's testimony was enduring," once two of the counts  
 11 against the defendant had been dismissed. *Id.* at 128. Thus, the trial court did not abuse its  
 12 discretion by not inquiring further into defendant's "generalized assertion" that the identity of an  
 13 informant would help the defendant. *Id.* *Brodie* does not establish, therefore, that participation in a  
 14 charged transaction is a threshold for confidential informant disclosure. Materiality thus exceeds  
 15 mere percipience of a charged transaction by a confidential informant.

16 Finally, the government argues that because it has "no intention of calling either CI as a  
 17 witness at this juncture, *Giglio* does not mandate the disclosure of any benefits they received."  
 18 (Response, Doc. 83, at 4:9-10). Again, while *Giglio* mandates disclosure of impeachment  
 19 evidence, defendants' request is premised on more than *Giglio* and seeks more than just the  
 20 benefits received by some confidential informants. Pursuant to *Brady* and Rule 3.8, defendants  
 21 seek the government's confidential informant files because defendants believe they contain  
 22 information that is favorable to all stages of its defense, including defense theories of medical  
 23 necessity, bias, false accusations, entrapment, and sentencing entrapment. Furthermore, and fatal  
 24 to the government's argument against disclosure, is that an alleged conspiracy forms the  
 25 government's center-piece charge. ("Beginning at a date unknown, and continuing to in and  
 26 around August 2010, the defendants worked together to distribute large amounts of highly  
 27 addictive prescription drugs in and around Las Vegas." Indictment 1:21-23, Sept. 21, 2011,  
 28 Docket No. 4). The breadth of the conspiracy charge belies the government's argument that the

1 confidential informants were not present at any of the charged transactions or at least involved in  
2 those transactions. Disclosure of the government's confidential informant files is therefore  
3 necessary under *Brady* and Rule 3.8 because governmental action throughout the entire  
4 investigation, not just during the charged transactions, is a crucial component of the defense of this  
5 matter.

6 **IV. CONCLUSION**

7 For the above reasons and those stated in their Motion (Docket No. 66), Defendants Henri  
8 Wetselaar, M.D. and David Litwin respectfully request this Court to grant their Motion for  
9 Discovery and Order the government to disclose the requested items within thirty days.

10 DATED this 10<sup>th</sup> day of May 2013

11 LEWIS BRISBOIS BISGAARD & SMITH LLP

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**CERTIFICATE OF SERVICE**

2 In accordance with Rule 49(c) of the Federal Rules of Criminal Procedure and Rule 47-11  
3 of the Local Rules of Practice of the United States District Court for the District of Nevada, I  
4 certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, and that on this  
5 10<sup>th</sup> day of May 2013, I did cause a true copy of:

**DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE  
TO MOTION FOR DISCOVERY**

8 to be served via electronic service by the U.S. District Court CM/ECF system to the parties on the  
9 Electronic Filing System in this action.

By: /s/ Crystal Marshall  
An Employee of  
LEWIS BRISBOIS BISGAARD & SMITH LLP